NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
4110 Chain Bridge Road
Fairfax, Virginia 22030-4009

703-246-2221 • Fax: 703-246-5496 • TDD: 703-352-4139

COUNTY OF FAIRFAX   CITY OF FAIRFAX

BRUCE D. WHITE, CHIEF JUDGE
RANDY I. BELLOWS
ROBERT J. SMITH
BRETT A. KASSABIAN
MICHAEL F. DEVINE
JOHN M. TRAN
GRACE BURKE CARROLL
DANIEL E. ORTIZ
PENNEY S. AZCARATE
STEPHEN C. SHANNON
THOMAS P. MANN
RICHARD E. GARDINER
DAVID BERNHARD
DAVID A. OBLON
DONTAÈ L. BUGG

JUDGES

THOMAS A. FORTKORT
J. HOWE BROWN
F. BRUCE BACH
M. LANGHORNE KEITH
ARTHUR B. VIEREGG
KATHLEEN H. MACKAY
ROBERT W. WOOLDRIDGE, JR.
MICHAEL P. McWEENY
GAYLORD L. FINCH, JR.
STANLEY P. KLEIN
LESLIE M. ALDEN
MARCUS D. WILLIAMS
JONATHAN C. THACHER
CHARLES J. MAXFIELD
DENNIS J. SMITH
LORRAINE NORDLUND
DAVID S. SCHELL
JAN L. BRODIE

RETIRED JUDGES

February 14, 2020

Todd G. Betor, Esquire
700 Sixth Street, NW, Suite 700
Washington, DC 20001-3980
Counsel for Plaintiff, Coxcom, LLC

Daniel Robinson, Esquire
County Attorney
12000 Government Center Parkway, Suite 549
Fairfax, VA 22035
Counsel for Defendant, Fairfax County, et al.

Re: *Board of Supervisors, Fairfax County, Virginia, et al. vs. Coxcom, LLC, d/b/a Cox Communications Northern Virginia*, Case No. CL-2019-5800

Dear Counsel:

This matter is before the court on Plaintiff's, Coxcom, LLC d/b/a Cox Communications Northern Virginia (hereinafter "Cox"), Motion for Partial Summary Judgment and Defendants', Fairfax County and Board of Supervisors of Fairfax County (hereinafter "County"), Motion for Summary Judgment.[1]

The two issues to be decided are (1) whether Virginia's Business, Professional, and Occupational License (BPOL) tax is a tax on internet access, making it preempted by the Internet Tax Freedom Act ("ITFA"); and (2) whether the burden shifts to the County to show that its' tax is afforded grandfather protection prior to the enactment of ITFA (October 1, 1998). After

[1] CL-2019-5900; Board of Supervisors, Fairfax County, Virginia, et al. vs. Coxcom, LLC, d/b/a Cox Communications Northern Virginia has been consolidated with CL-2019-6603; Board of Supervisors of Fairfax County, Virginia et al. vs. Coxcom LLC.

OPINION LETTER

considering the pleadings and oral arguments of both parties, the Court finds that Cox's Motion for Partial Summary Judgment should be granted as the BPOL tax is preempted by IFTA and thus the burden shifts to the County to prove whether the tax was imposed and enforced prior to October 1, 1998, and therefore grandfathered from application. Further, the County's Motion for Summary Judgment is denied.

I. **BACKGROUND**

The facts are taken from the briefs and those presented at the evidentiary hearing on November 21, 2019.

On December 22, 2016, Cox sought a refund of BPOL tax paid to Fairfax County on gross receipts from internet access services for the years of 2013, 2014, and 2015. On August 14, 2017, the County Commissioner of the Department of Taxation issued a Final Local Determination denying Cox's request. The Local Determination stated that BPOL tax is not a tax that is prohibited or preempted by ITFA. However, even if ITFA applied, the grandfather clause of ITFA would permit Fairfax County to collect the BPOL tax. Cox appealed and on May 21, 2018, the Tax Commissioner issued a Final State Determination finding ITFA generally applied to the BPOL tax, and the county assessing the tax must prove it qualifies for an exemption under the Act's grandfather provisions.

Relying heavily on *Dulles Duty Free, LLC v. City of Loudon*, the Tax Commissioner's Final State Determination found in favor of Cox. Yet, "[b]ecause the remaining issue involves a dispute between the Taxpayer [Cox] and the County regarding whether the County was grandfathered under the Act, the Department declines to issue an order for correction." Both parties appealed the determination and the case was brought before Fairfax Circuit Court.

ITFA bars state and local government from imposing "taxes on internet access." ITFA § 1101(a)(1). Congress enacted ITFA in 1998 as a temporary moratorium on state and local taxation of Internet access. *City of Eugene v. Comcast of Or. II, Inc.*, 359 Ore. 528, 533 (2016). Congress has extended that moratorium numerous times, including the three years (2013, 2014, and 2015) at issue in this case. *See id.* In February 2016, the moratorium became permanent. Pub. L. 114-125 § 922 (2016). ITFA defines a tax "as any charge imposed by any governmental entity for the purpose of generating revenues for governmental purposes and is not a fee imposed for a specific privilege, service, or benefit conferred." ITFA § 1105(8)(A)(i). However, ITFA does not apply to a tax on Internet access that was generally imposed and actually enforced prior to October 1, 1998, if, before that date, the tax was authorized by statute. 47 U.S.C. § 1104(a)(1).

Cox contends that Fairfax's BPOL tax violates ITFA because it is a tax on gross receipts including those receipts derived from internet access. Thus, Cox requests return of any taxes collected from its internet access receipts, complying with ITFA unless the County can prove that the tax was enforced and therefore was grandfathered in prior to the October 1, 1998, enactment of ITFA.

II. **ARGUMENTS**

Cox argues that BPOL tax is a "tax" as defined by ITFA. Specifically, that "any charge imposed by any governmental entity" is unambiguous and the charge does not fall within "a fee imposed for a specific privilege, service, or benefit conferred." 47 U.S.C. § 1104(a)(1). It reasons that because the revenues from the BPOL go into a general fund merely aiming to raise revenue, the BPOL tax falls into the category of a tax. Further, the BPOL tax is not a tax on the goods at issue, but a tax on the privilege to engage in business activity, merely measured by gross receipts. Thus, the BPOL tax is clearly a tax. To support its argument, Cox relies on *Dulles Duty Free, LLC v. Cty. of Loudoun*, which holds that the BPOL tax is a "direct tax on the export of goods in transit." 294 Va. 9, 23-24 (2017). Specifically, Cox argues that ITFA's explicit prohibition of taxes on internet access, except in specified situations, reads like a qualified immunization from state taxation of internet access.

Moreover, Cox argues that whether the County is exempt from ITFA by the grandfather clause exemption from the statute rests with the local jurisdiction seeking to benefit from the exemption. Here, that local jurisdiction is the County and thus, the burden rests with the County to prove it is exempted.

The County argues that the BPOL tax is excluded as it falls under ITFA's "fees for specific privilege" exception. Specifically, that it is a fee "imposed on a business for the privilege of operating a business in a locality in Virginia." Additionally, the County maintains that *Dulles Duty Free* does not apply because the Export-Import Clause at issue is different than ITFA. Moreover, the County contends that the Tax Commissioner's opinion, stating that the BPOL tax is a tax and the County has the burden to prove that it is grandfather in, should not be given any weight as the Court has its own *de novo* review of the statutes. See Va. Code § 58.1-3701.

Finally, the County contends that ITFA should be read narrowly and thus the absence of express language prohibiting the County's BPOL tax illustrates that the BPOL tax should not be preempted. Further, the County's tax is imposed for a privilege and not as a tax on internet access, therefore, even if ITFA applies BPOL tax is still permissible under the statute.

III. **ANALYSIS**

A. Standard of Review

Summary judgment shall not be entered if any material fact is genuinely in dispute. Va. Sup. Ct. R. 3:20. Summary judgment is intended to allow courts to "bring litigation to an end at an early stage, when it clearly appears that one of the parties is entitled to judgment within the framework of the case." *Carwile v. Richmond Newspapers, Inc.*, 196 Va. 1, 5 (1954).

Nevertheless, the Supreme Court of Virginia has indicated repeatedly that summary judgment is considered a drastic remedy and is strongly disfavored. *Smith v. Smith*, 254 Va. 99,

103 (1997). Accordingly, a trial court considering a motion for summary judgment must "accept as true 'those inferences from the facts that are most favorable to the nonmoving party, unless the inferences are forced, strained, or contrary to reason.'" *Klaiber v. Freemason Assocs.*, 266 Va. 478, 484 (2003).

However, when there is no material fact genuinely in dispute, and when the moving party is entitled to judgment as a matter of law, the court shall enter judgment in that party's favor. Va. Sup. Ct. R. 3:20.[2]

B. Fairfax County's BPOL Tax is a Tax

ITFA defines "tax" as "any charge imposed by any governmental entity for the purpose of generating revenues for governmental purposes and is not a fee imposed for a specific privilege, service, or benefit conferred." ITFA §1105(8)(A)(i). Here, Fairfax County concedes that the BPOL tax is a tax but that the tax is imposed for a special privilege. Cox responds that it cannot be both a tax and a fee imposed for a special privilege because Virginia law holds that taxes and fees are distinct terms.

A fee is a charge "imposed for the purpose of regulation and the statute requires compliance with certain conditions in addition to the payment of the prescribed sum." *City of Charlottesville v. Marks' Shows*, 179 Va. 321, 329 (1942). Whereas a tax, "is exacted solely for revenue purposes and its payment gives the right to carry the business without any further conditions." *Loudon Cty. v. Parker*, 205 Va. 357, 360 (1964).

Moreover, in *Dulles Duty Free, LLC v. Cty. of Loudoun,* the Virginia Supreme Court held "the BPOL tax is in its operation and effect a *direct tax* on the export of goods in transit." 294 Va. 9, 23, 24 (2017). Here, the Fairfax County Board of Supervisors—a legislative body—imposes the charge on every business operating in the county. The taxes go into the general fund and are used for general purposes. Thus, the BPOL tax is just that, a tax. Whereas a fee, which is excluded from ITFA, is used for a specific and narrow purpose. Therefore, despite the contention that BPOL tax is used for a specific privilege, it still is a tax. The question becomes whether the tax is a tax on internet access.

C. The BPOL Tax is a Tax on Internet Access Under IFTA

ITFA bars state and local government from imposing "taxes on internet access." ITFA § 1101(a)(1). The County argues that because ITFA does not contain a "gross receipts" prohibition the plain text of ITFA does not preempt the County's tax.

Specifically, it cites *Aloha Airlines, Inc. v. Director of Taxation of Hawaii*, holding that a statute prohibiting taxation on persons traveling in air commerce or on the gross receipts derived

[2] The parties enter into a Joint Stipulations of Fact, attached as Exhibit 2.

therefrom is prohibited. 464 U.S. 7, 10 (1983). The County distinguishes ITFA from *Aloha Airlines* by stating that Congress could have drafted ITFA more broadly if it wanted to prohibit a gross receipt tax, but it did not. Thus, the tax is valid under ITFA.

However, Cox contends that the definition of a "tax on internet access" is defined as any tax that burdens internet access irrespective of who the tax is imposed on and regardless of the terminology used to describe the tax. ITFA § 1105(10)(A). In fact, only taxes "levied upon or measured by net income, capital stock, net worth, or property value" are excepted from the provision. ITFA § 1105(10)(B).

Although the provision in *Aloha Airlines* specifically states that gross receipts are exempted, Congress unequivocally drafted ITFA, which prohibits taxes on internet access in any form except those listed by the exceptions. Thus, a tax on gross receipts, including those receipts providing internet access, are in violation of ITFA. As the taxes are in violation of ITFA the burden now shifts to the County to prove that the BPOL tax is grandfathered prior to ITFA's October 1, 1998, enactment.

Because the BPOL tax is a tax and it is a tax on internet access, no material fact genuinely in dispute exists and therefore, Cox is entitled to judgment as a matter of law for its partial summary judgment. *See* Va. Sup. Ct. R. 3:20.

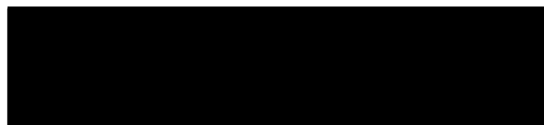
IV. CONCLUSION

For the reasons stated herein, this Court holds that no material fact genuinely in dispute exists regarding whether the BPOL tax is a tax on internet access. Therefore, Cox is entitled to a judgment as a matter of law. Accordingly, this court holds that Plaintiff's Motion for Partial Summary Judgment is granted and the burden now shifts to the County to prove that it falls within the protection of the grandfather clause. The County's Motion for Summary Judgment is denied.

Parties are to circulate and submit an appropriate order reflecting the Court's ruling by February 27, 2020.

And this matter continues.

Very truly yours,



Grace Burke Carroll

OPINION LETTER